Volume 104 | Issue 1 Article 10

September 2001

Balancing States' Rights with Individual Rights: Tipping the Scales against the Rights of Non-Suspect Classes

Linda Carter Batiste

BALANCING STATES' RIGHTS WITH INDIVIDUAL RIGHTS: TIPPING THE SCALES AGAINST THE RIGHTS OF NON-SUSPECT CLASSES

I. INTRODUCTION

> The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may in a particular manner be expected to flow from the establishment of a constitution founded upon a total or partial incorporation of a number of distinct sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent whole. – Alexander Hamilton[1]

[1] THE FEDERALIST NO. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The Framers of the U.S. Constitution recognized that they were entering unknown territory by setting up a dual system of state and federal governments. True to Hamilton's prediction, many intricate questions have arisen regarding the balance of power between the states and the federal government.[2] One of the most debated questions is whether private citizens can sue the states in federal court to enforce individual rights under federal law or whether the states enjoy immunity from such suits.[3] Historically, protecting individual rights has been an important role of the federal government, but enforcing individual rights against violations by states threatens the states' sovereignty.[4] This Article examines the struggle to balance these important interests. First, the Article reviews the history of state immunity and the Eleventh Amendment. Second, the Article discusses abrogation of state immunity under the Fourteenth Amendment. Third, the Article examines the most recent facet of this struggle: enforcing the rights of non-suspect classes, such as people who are elderly or disabled, against violations by states. Finally, the Article concludes that, under the Supreme Court's current stringent test for proper abrogation of state immunity, Congress probably cannot abrogate state immunity in legislation that protects non-suspect classes.

II. HISTORY OF STATE IMMUNITY

A. *Origins of State Immunity and the Eleventh Amendment*

State immunity from suit in federal court is central to our federalist system, affecting the balance of power between the states and the federal government.[5] Although most legal scholars agree that the doctrine of sovereign immunity originated in Europe, its development in the United States is less clear.[6] Many scholars believe that the states surrendered some of their sovereign immunity when they formed the United States, that Article III of the Constitution gave federal courts the power to hear suits against states as defendants, and that the Eleventh Amendment subsequently restored state immunity from such suits.[7] Others, including a majority of the current Supreme Court, believe that Article III did not give the federal courts the power to hear cases involving states as defendants; rather, the Eleventh Amendment merely corrected a misinterpreta-

---

2 *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 88-89 (13th ed. 1997).

3 *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 391-93 (3d ed. 1999).

4 *See id.* at 388.

5 *See id.* at 390.

6 *See* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1064-65 (1983).

7 *See* CHEMERINSKY, *supra* note 3, at 390-96.

tion of Article III, restoring the original constitutional limits of the federal courts.[8]

Despite the uncertainty about the origin of the doctrine of sovereign immunity in the United States, it is clear that Congress intended to provide state immunity through the Eleventh Amendment.[9] Congress proposed the Eleventh Amendment in response to *Chisholm v. Georgia*,[10] a 1793 case involving a suit against a state by a citizen of another state.[11] In *Chisholm*, the Supreme Court accepted jurisdiction under the Judiciary Act of 1789, which gave the Court original jurisdiction over suits between states and citizens of other states.[12] Congress passed the Judiciary Act just prior to *Chisholm*, relying on Article III, Section 2, of the Constitution, which reads, in part, that "[t]he judicial power shall extend to . . . controversies . . . between a State and Citizens of another State . . ."[13] and "in all cases . . . in which a state shall be a party, the Supreme Court shall have original jurisdiction."[14]

Although textually Article III appeared to support Supreme Court jurisdiction in *Chisholm*, the country reacted so negatively to the suit that Congress proposed the Eleventh Amendment at its first meeting after the decision.[15] Apparently, Congress intended to override the result in *Chisholm* and prevent further suits in federal court against states by citizens of other states.[16] The text of the Eleventh Amendment expressly prohibits state-citizen federal diversity suits in law or equity:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign states.[17]

---

8 *See id. See also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 64 (1996) ("[T]he Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III."); Hans v. Louisiana, 134 U.S. 1, 15 (1890) ("The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States.").

9 CHEMERINSKY, *supra* note 3, at 395-96.

10 2 U.S. 419 (1793), *overruled by* U.S. CONST. amend. XI.

11 *Id.*

12 The Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

13 U.S. CONST. art. III, § 2, cl. 1.

14 *Id.* at cl. 2.

15 *Hans*, 134 U.S. at 11.

16 CHEMERINSKY, *supra* note 3, at 394.

17 U.S. CONST. amend. XI.

However, despite its limited textual meaning, legal scholars disagree about the scope of the Eleventh Amendment and courts, including the Supreme Court, have not been consistent in interpreting it.[18]

B. *Supreme Court Expansion of State Immunity*

Prior to the Civil War, the Supreme Court limited the application of state immunity under the Eleventh Amendment to state-citizen diversity suits.[19] The Amendment was not thought to bar suits against states by their own citizens, federal question suits against states, or suits against state officials acting illegally under federal law.[20] However, this limited interpretation may have prevailed only because the Supreme Court did not have an opportunity to address the application of the Eleventh Amendment to such suits until after 1875 when Congress first authorized general federal question jurisdiction for the federal courts.[21]

Congress gave the federal courts general federal question jurisdiction in the aftermath of the Civil War.[22] As a result, many people sued southern states in federal court after the states defaulted on revenue bonds, allegedly in violation of the Contracts Clause of the Constitution.[23] When these cases made their way to the Supreme Court, the Court made its first expansion of the Eleventh Amendment.[24] In 1890 in *Hans v. Louisiana*,[25] a resident of Louisiana brought suit against the State in federal court alleging a Contracts Clause violation.[26] The Court held that the Eleventh Amendment was intended to bar not only suits against states by citizens of other states, but also suits against states by their own citizens.[27] Thus, unless the states waived their immunity,[28] the states were immune from prosecution in federal court and the debts they owed were, in effect, relieved. The broader repercussion of *Hans* was that, absent congressional legis-

---

18 CHEMERINSKY, *supra* note 3, at 388.

19 Fletcher, *supra* note 6, at 1084.

20 *Id.* at 1084-87.

21 CHEMERINSKY, *supra* note 3, at 264. Prior to 1875, Congress passed several statutes giving the federal courts jurisdiction over specific matters, but did not give federal courts jurisdiction over all federal questions until the 1875 Act. *Id.*

22 Fletcher, *supra* note 6, at 1087.

23 *Id.* at 1087-88.

24 *Id.* at 1088.

25 134 U.S. 1(1890).

26 *Id.*

27 *See id.* at 12-21.

28 *See infra* text accompanying notes 36-41.

lation,[29] the federal judiciary did not have jurisdiction over federal question suits involving private citizens as plaintiffs and states as defendants.[30]

In 1921, the Supreme Court further expanded the Eleventh Amendment when it decided that states were immune to suits in admiralty, even though the text of the Eleventh Amendment only referred to suits in law or equity.[31] The Court explained that "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given . . . [n]or is the admiralty and maritime jurisdiction exempt from the operation of the rule."[32] Similarly, in 1934 the Court extended the Eleventh Amendment to suits brought by foreign governments against the states.[33] The Court declared that it could not "assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control."[34]

Thus, by 1934, the Supreme Court had expanded the Eleventh Amendment to provide states with immunity not only in suits against states by citizens of another state, but also in suits by states' own citizens and in suits by foreign governments. Further, the Court extended state immunity beyond suits in law and equity to include suits in admiralty.

C. *Limitations on State Immunity*

Although the Supreme Court expanded Eleventh Amendment state immunity in several ways, the Court also carved out three exceptions.[35] One exception is a state's waiver of immunity.[36] The Supreme Court has established that a state can waive its immunity and thus consent to suit in federal court.[37] Such waiver of immunity can be either express or implied.[38] Express waiver generally

---

29 *See infra* text accompanying notes 51-58.

30 *See* Fletcher, *supra* note 6, at 1088.

31 *See Ex parte* New York, 256 U.S. 490, 497 (1921).

32 *Id.*

33 Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

34 *Id.* at 322.

35 CHEMERINSKY, *supra* note 3, at 389.

36 *Id.* at 431.

37 *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985) ("[I]f a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action."); Clark v. Barnard, 108 U.S. 436, 447 (1883) ("The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure.").

38 Kit Kinports, *Implied Waiver After* Seminole Tribe, 82 MINN. L. REV. 793, 798 (1998).

is made through a state statute or state constitution, and requires a state to clearly express its consent to be sued in federal court.[39] In contrast, implied waivers generally occur when a state participates in federal litigation or federal programs.[40] However, the Supreme Court has so severely restricted implied waivers and made the tests for both express and implied waiver so stringent that waivers are rarely found.[41]

The second exception to state immunity involves suits against state officials, as opposed to the states themselves.[42] In *Ex parte Young*,[43] the Court held that a state official, acting in his official capacity, could be sued in federal court, but only for injunctive relief to stop the official from continuing unconstitutional behavior.[44] The Court held that a suit against a state official to stop the official from violating the constitutional rights of a citizen is not a suit against the state itself, so the Eleventh Amendment does not bar such an action.[45] This distinction between a state and its officials has been criticized as an obvious legal fiction.[46] The premise is that a state official who acts unconstitutionally is stripped of the state's authority and, therefore, the official is not entitled to state immu-

---

[39] *See id.* at 798-99.

[40] *See* Note, *Reconceptualizing the Role of Constructive Waiver after* Seminole, 112 HARV. L. REV. 1759, 1767, 1770 (1999). Congress has the power to condition receipt of federal money on states' consent to suit in federal court as long it clearly expresses its intent to do so and the conditions on spending are reasonably related to the purpose of the expenditure. *See id.* at 1774. *See also infra* text accompanying notes 201-04.

[41] *See, e.g.*, College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 686-87 (1999) (limiting implied waiver of state immunity to instances when Congress requires waiver of state immunity as a condition on approval of interstate compacts or on receipt of federal funds); CHEMERINSKY, *supra* note 3, at 433, 436.

[42] CHEMERINSKY, *supra* note 3, at 412.

[43] 209 U.S. 123 (1908). *Ex parte* Young has been called one of the most important Supreme Court cases ever decided. CHEMERINSKY, *supra* note 3, at 412. Without it, federal courts would essentially be powerless to prevent state violations of the Constitution and federal law. *Id.* at 415.

[44] *See Ex Parte Young*, 209 U.S. at 159. Along the same lines, in Hafer v. Melo, 502 U.S. 21 (1991), the Court ruled that a private citizen could sue a state official in the official's individual capacity and seek damages under 42 U.S.C. § 1983. The Court stated that

> [w]hile the doctrine of *Ex parte* Young does not apply where a plaintiff seeks damages from the public treasury, damages awards against individual defendants in federal courts "are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." That is, the Eleventh Amendment does not erect a barrier against suits to impose "individual and personal liability" on state officials under § 1983.

Hafer, 502 U.S. at 30-31 (quoting Scheuer v. Rhodes, 416 U.S. 232, 238 (1974)).

[45] *See Ex Parte Young*, 209 U.S. at 159-60.

[46] CHEMERINSKY, *supra* note 3, at 414-15.

nity.[47] However, the Constitution does not prohibit private conduct, so if the official is stripped of state authority, the official is essentially a private entity and should not be subject to suit for constitutional violations.[48] The Supreme Court explained this apparent inconsistency by distinguishing "state action" under the Eleventh Amendment from "state action" under the Fourteenth Amendment.[49] Because the Fourteenth Amendment was enacted specifically as a limitation on the states, it included a more expansive definition of "state action."[50] Hence, individual conduct not entitled to state immunity under the Eleventh Amendment may nonetheless constitute state action under the Fourteenth Amendment.

The final exception to state immunity involves congressional abrogation of state immunity through legislation.[51] Beginning with *Hans v. Louisiana*, the Supreme Court held that the Eleventh Amendment impliedly limited federal question jurisdiction in suits against non-consenting states.[52] However, in 1976 the Court held that Congress could abrogate the states' immunity while acting pursuant to its authority under the Fourteenth Amendment.[53] The Court, noting that the Fourteenth Amendment shifted the federal-state balance of power, stated that "[t]here can be no doubt that . . . Congress, acting under the Civil War Amendments, [can intrude] into the judicial, executive, and legislative spheres of autonomy previously reserved to the States."[54] Additionally, in 1989 in *Pennsylvania v. Union Gas Co.*,[55] the Court decided that Congress could not only abrogate state immunity when acting pursuant to its authority under the Fourteenth Amendment, but also when acting pursuant to its Commerce Clause

---

47 *Id.* at 414.

48 *Id.* at 415.

49 *Id.* Manipulating the definition of "state action" in this manner seems as fictional as making a distinction between "state" and "state officials," but has been accepted as a way to circumvent the Eleventh Amendment. *Id.*

50 *See* Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 286-89 (1913).

51 CHEMERINSKY, *supra* note 3, at 436-37.

52 *See* 134 U.S. 1 (1890).

53 *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). In later cases, the Court added the requirement that Congress must clearly express its intent to abrogate state immunity; that is, abrogation cannot be implied. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (stating that a general authorization for suit in federal court is insufficient); Quern v. Jordan, 440 U.S. 332, 345 (1979) (holding that Congress did not abrogate state immunity in § 1983 because it did not explicitly and by clear language indicate its intent to do so). *See also infra* text accompanying notes 86-87 (discussing the requirement that Congress clearly express its intent to abrogate state immunity).

54 *Fitzpatrick*, 427 U.S. at 455.

55 91 U.S. 1 (1989) (plurality opinion), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

power under Article I of the Constitution.[56] The Court reasoned that the states gave up part of their sovereign immunity when they formed the United States, and by giving Congress the power to regulate commerce the states specifically surrendered any sovereign immunity that would stand in the way of such regulation.[57] The Court concluded that there was no difference between the shift in the federal-state balance created by the Fourteenth Amendment and that created by the Commerce Clause.[58]

Therefore, as of 1989, the Supreme Court recognized three exceptions to state immunity: state waiver of immunity, suits against state officials, and congressional abrogation through legislation. However, Congress's power to abrogate state immunity through legislation was significantly reduced in the landmark Supreme Court decision in *Seminole Tribe v. Florida*.[59]

D. New Era of Expansion of State Immunity

In 1996, the Supreme Court overruled *Union Gas*, marking the beginning of a new era of expansion of state immunity.[60] In *Seminole Tribe v. Florida*,[61] the Supreme Court held that Congress's Article I powers do not override Article III or Eleventh Amendment proscriptions.[62] *Seminole Tribe* involved a challenge to the Indian Gaming Regulatory Act of 1988, a statute passed by Congress under its Article I power to regulate commerce with Indian tribes.[63] Chief Justice Rehnquist, writing for the majority, stated that "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by

---

56 *Id.* at 16-17. The *Union Gas* Court was deeply divided on the issues presented in the case. For example, Justices Brennan, Marshall, Blackmun, Stevens, and White agreed that Congress could abrogate state immunity when legislating under the Commerce Clause, while Justices Scalia, Rehnquist, O'Conner, and Kennedy dissented on the issue. Justices Brennan, Marshall, Blackmun, Stevens, and Scalia agreed that Congress had clearly expressed its intent to abrogate state immunity in the statute at issue, while Justices Rehnquist, O'Conner, Kennedy, and White believed that Congress had not clearly expressed such intent. *Id.* at 4.

57 *Id.* at 14 (quoting Parden v. Terminal Ry., 377 U.S. 184, 191-92 (1964)).

58 *Id.* at 16.

59 517 U.S. 44 (1996) (overruling *Union Gas*, 491 U.S. 1 (1989), and holding that Congress cannot abrogate state immunity when legislating pursuant to its Article I power).

60 *See* CHEMERINSKY, *supra* note 3, at 389.

61 517 U.S. 44 (1996) (5-4 decision). The majority included the four dissenters in *Union Gas*, Chief Justice Rehnquist and Justices Scalia, O'Conner, and Kennedy, joined by a new member of the Court, Justice Thomas. The minority included Justices Souter, Stevens, Ginsburg, and Breyer. *Id.* at 46.

62 *Id.* at 72-73.

63 *See id.* at 47.

private parties against unconsenting States."[64] The decision thus restored the broad scope of the doctrine of sovereign immunity and reduced the power of the federal government to enforce federal laws.[65]

In overruling *Union Gas*, the majority in *Seminole Tribe* stressed that *Union Gas* was a "deeply fractured," plurality opinion that departed from the established "principle that state sovereign immunity limited the federal courts' jurisdiction under Article III."[66] The Court stated that the conclusion in *Union Gas* that the Commerce Clause and the Fourteenth Amendment equally affected the balance of federal-state power was "misplaced."[67] Rather, as the *Seminole Tribe* Court explained, only the Fourteenth Amendment altered the federal-state balance of power; otherwise, the states enjoyed common law sovereign immunity from suit in federal court.[68]

Justice Souter wrote a lengthy dissent in *Seminole Tribe*, stating that the majority was "fundamentally mistaken."[69] After exploring the arguments made by the Framers of the Constitution, the history and text of the Eleventh Amendment, and relevant case law, Justice Souter concluded that there was no common law sovereign immunity incorporated into either the original Constitution or the Eleventh Amendment.[70] In Justice Souter's opinion, the Eleventh Amendment reached only citizen-state diversity suits and not federal question suits.[71] Therefore, he found the majority decision to be an "abdication of [the Court's] responsibility to exercise the jurisdiction entrusted to [the Court] in Article III."[72]

---

64 *See id.* at 72.

65 *See generally id.* (explaining that the Court was merely reconfirming the principle of state sovereign immunity embodied in the Eleventh Amendment and inherent in the nature of sovereign immunity is the principle that states are not amenable to the suit of an individual, absent consent). In addition to limiting congressional power to abrogate state immunity through Article I powers, the *Seminole Tribe* decision also narrowed somewhat the *Ex parte Young* doctrine by limiting its application to suits involving federal laws with comprehensive enforcement mechanisms. *Id.* at 74. In a subsequent case, the Court further narrowed the *Ex parte Young* doctrine by holding that state officials cannot be sued to quiet title to submerged lands, but refused to reformulate *Ex parte Young* to a case-by-case balancing approach as advocated by Justice Kennedy. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) (5-4 decision). The same 5-4 split found in *Seminole Tribe* made up the majority and minority in *Couer d'Alene*. *Id.* at 262-63.

66 *Seminole Tribe*, 517 U.S. at 64.

67 *Id.* at 65.

68 *Id.* at 65-66 (explaining that the original federal-state balance of power in the Constitution did not allow Congress to abrogate state immunity, so that any congressional powers created prior to the Eleventh Amendment (i.e., all powers enumerated in Article I) did not include the power to abrogate).

69 *Id.* at 100 (Souter, J., dissenting).

70 *See id.* at 185.

71 *See id.* at 110-11.

72 *Id.* at 185 (Souter, J., dissenting).

Subsequent Supreme Court cases illustrate the significance of the *Seminole Tribe* decision. For example, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[73] a private bank invented a special type of college-savings account, for which it received a federal patent.[74] When the State of Florida introduced a similar account, the private bank sued the State for patent infringement under the Patent Remedy Act.[75] The State moved to dismiss on the ground of sovereign immunity, while the bank argued that the State was not entitled to immunity because Congress had properly abrogated state immunity in the Patent Remedy Act.[76] The Court, citing *Seminole Tribe*, made clear that Congress does not have the power to abrogate state immunity when legislating pursuant to any of its Article I powers, including the Patent Clause.[77] Thus, absent its consent, the State of Florida was not subject to suit in federal court for allegedly violating the Patent Remedy Act.

Another case that illustrates the significance of *Seminole Tribe* is *Alden v. Maine*.[78] In *Alden*, the State of Maine challenged Congress's power to require states to hear federal question suits against the State in the State's own court.[79] The plaintiffs, a group of probation officers for the State of Maine, tried to bring suit against their employer in federal court under the Fair Labor Standards Act.[80] While the suit was pending, the Court decided *Seminole Tribe*, and the *Alden* suit was consequently dismissed.[81] The plaintiffs then filed the same action in state court because the Act authorized private actions against states in state court.[82] Maine challenged the suit on the ground that sovereign immunity prevented Congress from forcing the State to hear federal question suits against the State in the State's own courts.[83] The Supreme Court agreed, holding that "the powers delegated to Congress under Article I of the Constitution do not include the power to subject non-consenting States to private suits for damages

---

73 527 U.S 627 (1999) (5-4 decision).

74 *Id.* at 630-31. The same split of Justices found in *Seminole Tribe* comprised the majority and minority in *Florida Prepaid. Id.* at 629.

75 *Id.* at 632-33.

76 *Id.* at 633.

77 *Id.* at 636. Although Congress can sometimes abrogate state immunity pursuant to the Fourteenth Amendment, the Court in *Florida Prepaid* held that Congress had not properly done so in the Patent Remedy Act. *Id.* at 647.

78 527 U.S. 706 (1999) (5-4 decision). Again, the same split of Justices found in *Seminole Tribe* comprised the majority and minority in *Alden*. *Id.* at 710.

79 *See id.* at 712.

80 *Id.* at 711.

81 *Id.* at 712.

82 *See id.*

83 *See id.*

in state courts."[84]

Thus, in the past decade the Supreme Court has severely restricted Congress's power to abrogate state immunity through legislation. However, Congress may still abrogate state immunity when appropriately legislating under its Fourteenth Amendment powers.[85] The issue, then, is what constitutes "appropriate legislation" when determining whether Congress can abrogate state immunity.

III. ABROGATION OF STATE IMMUNITY UNDER THE FOURTEENTH AMENDMENT

To determine whether Congress properly abrogated state immunity in particular legislation, courts apply a two-part test: first, Congress must unequivocally express its intent to abrogate immunity, and second, the legislation at issue must be appropriate legislation under the Fourteenth Amendment.[86] The first part of the test is straightforward: Congress's intent to abrogate immunity "must be obvious from 'a clear legislative statement.'"[87] The second part of the test is more difficult to apply.[88] To understand what is appropriate legislation under the Fourteenth Amendment, it is important to review the history of legislation under the Amendment, as well as recent judicial developments.

A. *History of Legislation under the Fourteenth Amendment*

The Fourteenth Amendment was passed in the aftermath of the Civil War, giving the federal government the power to protect recently freed slaves from oppression by the states.[89] Section 1 of the Fourteenth Amendment, commonly known as the Equal Protection Clause, states in part that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[90] Section 5 of the Fourteenth Amendment gives Congress the power to enforce the Equal Protection Clause, stating that "Congress shall have power to

---

84 *Id.*

85 Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996) (upholding Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), which established Congress's power to abrogate state immunity in Fourteenth Amendment legislation).

86 *Id.* at 55.

87 *Id.* at 55 (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 786 (1991)).

88 *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L. J. 441, 457-58 (2000) (discussing that the test for appropriate legislation under the Fourteenth Amendment is ambiguous and not fully developed by the Court).

89 *See* GUNTHER & SULLIVAN, *supra* note 2, at 420.

90 U.S. CONST. amend. XIV, § 1.

enforce, by *appropriate legislation*, the provisions of this article."[91]

Although the original purpose of the Fourteenth Amendment was to protect the rights of freed slaves following the Civil War, courts have interpreted the Amendment's broad language to impose a general restraint on the use of classifications.[92] Historically the Supreme Court defined the breadth of protection afforded by the Fourteenth Amendment, while Congress merely used its Section 5 power to enact legislation to protect rights that had been judicially recognized.[93] However, in 1966 in *Katzenbach v. Morgan*,[94] the Supreme Court suggested that Congress, when legislating under the Fourteenth Amendment, did, in fact, have the power to determine what substantive rights the Amendment protected, even rights the Supreme Court had not recognized.[95]

Morgan involved a challenge to the Voting Rights Act of 1965, which barred literacy tests for Puerto Ricans educated in Spanish-language schools.[96] The State of New York challenged the Act because the Act prohibited the State from enforcing its own voting law, which required an ability to read and write English.[97] The State argued that Congress could not appropriately pass legislation barring English literacy requirements because the Supreme Court had not determined that such requirements violated the Equal Protection Clause of the Fourteenth Amendment.[98] Despite the State's argument, the Court upheld the Voting Rights Act, stating that neither the language nor the history of Section 5 supports the conclusion that Congress is limited to enforcing judicially recognized rights.[99] The Court held that Section 5 is a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[100]

---

91 *Id.* § 5 (emphasis added).

92 *See* GUNTHER & SULLIVAN, *supra* note 2, at 421 (stating that the Fourteenth Amendment used sweeping and general terms, not limited to race, color, or previous condition of servitude).

93 *See id.* at 984.

94 384 U.S. 641 (1966).

95 *See* GUNTHER & SULLIVAN, *supra* note 2, at 984.

96 *Morgan*, 384 U.S. at 643.

97 *Id.* at 643-45.

98 *Id.* at 648.

99 *Id.* at 648-49.

100 *Id.* at 651.

B. Recent Judicial Developments Affecting Abrogation of State Immunity under the Fourteenth Amendment

In *Fitzpatrick v. Bitzer*,[101] the Court first examined how the Fourteenth Amendment affected state immunity.[102] In *Fitzpatrick*, male employees of the State of Connecticut brought a class action suit against the State claiming that the State's retirement system discriminated against them under Title VII of the Civil Rights Act of 1964, an act applied to the states under Section 5 of the Fourteenth Amendment.[103] The principal question was whether, the Eleventh Amendment notwithstanding, Congress had the power to authorize federal courts to award damages against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment.[104] The Court held that the Fourteenth Amendment specifically limited state immunity, and therefore, Congress could abrogate state immunity under Section 5.[105]

Congress's power to abrogate state immunity under Section 5, combined with the implication in *Morgan* that Congress had the power to define the substantive guarantees of the Fourteenth Amendment, appeared to allow Congress broad power to abrogate state immunity in legislation protecting individual rights against state defendants.[106] However, in 1997 in *City of Boerne v. Flores*,[107] the Supreme Court both clarified and significantly narrowed the circumstances under which Congress can appropriately pass legislation under Section 5.[108] In turn, the Court's decision narrowed Congress's ability to abrogate state immunity.[109] In *Flores*, the Court found the Religious Freedom Restoration Act of 1993 (RFRA) to be unconstitutional because the Act attempted to expand the constitutional rights of individuals to religious freedom.[110] The RFRA required

---

101 427 U.S. 445 (1976).

102 *Id.*

103 *Id.* at 447-48.

104 *Id.* at 448.

105 *Id.* at 456.

106 *See* James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After* Seminole Tribe *and* Flores, 41 ARIZ. L. REV. 651, 676 (1999) (citing Katzenbach v. Morgan, 384 U.S. 641, 651 (1966), which stated that the standard for determining what is proper legislation under Section 5 was to judge what was necessary to carry out congressional powers).

107 521 U.S. 507 (1997).

108 *See* CHEMERINSKY, *supra* note 3, at 445.

109 *See id.*

110 *See Flores*, 521 U.S. at 536. Congress passed the RFRA in response to *Employment Division v. Smith*, a case in which the Supreme Court upheld the constitutionality of an Oregon law that prohibited the use of the drug peyote. 494 U.S. 872 (1990). Smith, who used peyote in his religious practices as a member of the Native American Church, was denied unemployment compensation after he lost his job for using peyote in violation of Oregon law. *Id.* at 874. Smith

states to have a compelling interest before burdening individual religious freedom.[111] The City of Boerne, Texas, challenged the constitutionality of the RFRA after a Catholic church relied on the Act to oppose a local zoning law under which the City denied the church a building permit.[112] The *Flores* Court determined that the RFRA expanded the constitutional right to religious freedom as previously defined by the Supreme Court.[113] Although the Court acknowledged that *Morgan* could be construed to mean that Congress had the power to enlarge constitutional rights via its Fourteenth Amendment power,[114] the Court nevertheless held that Congress does not have such power.[115] Rather, Congress's power to "enforce" the Fourteenth Amendment is remedial in nature.[116] Relying on a separation of powers argument, the Court stated that it alone determines the scope of constitutional protection; Congress's power is limited to enforcing the Fourteenth Amendment through legislation that remedies or prevents a judicially recognized constitutional violation.[117]

In addition, the *Flores* Court clarified the meaning of the *Morgan* Court's statement that Congress determines "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[118] The *Flores* Court explained that "legislation [that] deters or remedies constitutional violations can fall within the sweep of Congress'[s] enforcement power even if in the process it prohibits conduct [that] is not itself unconstitutional."[119] The Court cited the Voting Rights Act at issue in *Morgan* as one example of how legislation can prohibit constitutional behavior and yet still be remedial.[120] The *Flores*

---

challenged the Oregon law as a violation of his constitutional guarantee to free exercise of religion. *Id.* The Court upheld the Oregon law, stating that the Constitution allowed neutral, generally applicable laws, like the law at issue, to be applied to religious practices even when not supported by a compelling governmental interest. *Id.* at 885-86.

111 *Flores*, 521 U.S. at 515.

112 *See id.* at 512.

113 *See id.* at 536. *See also Smith*, 494 U.S. at 885-86 (defining the permissible scope of a state's infringement on religious practices); *supra* note 110 and accompanying text.

114 *Flores*, 521 U.S. at 527-28.

115 *Id.* at 519.

116 *Id.*

117 *Id.* at 535-36.

118 *Id.* at 536.

119 *Id.* at 518.

120 *See id.* The Voting Rights Act prohibits states from denying citizens the right to vote solely because they cannot speak English and, accordingly, bans states from requiring literacy tests for prospective voters. 42 U.S.C. § 1973b (1994). Despite the fact that literacy tests are facially constitutional, the *Morgan* Court upheld the Voting Rights Act's ban on literacy tests as a means of preventing unconstitutional race discrimination in voting. *See* Katzenbach v. Morgan, 384 U.S. 641, 658 (1966).

Court further explained that because it may be difficult to determine whether legislation remedies or prevents unconstitutional actions, as opposed to substantively changing constitutional rights, Congress must have wide latitude in making that determination.[121] However, "Congress'[s] discretion is not unlimited, [ ] and the courts retain the power . . . to determine if Congress has exceeded its authority under the Constitution."[122] The Court stated that the test to determine whether congressional legislation is within the scope of the Fourteenth Amendment is whether there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[123] Otherwise, legislation may become "substantive in operation and effect."[124] Because the Court found the reach and scope of the RFRA to be too broad to be remedial or preventive, the Court held that the RFRA was unconstitutional.[125]

Thus, *Flores* established a two-part test to determine whether legislation is "appropriate legislation" under the Fourteenth Amendment. First, the legislation must be intended to remedy or prevent a judicially recognized violation of constitutional rights.[126] Second, the legislation must be congruent and proportional to the constitutional violation being addressed.[127] As discussed in Part IV below, the *Flores* test, by narrowing what is considered appropriate legislation under the Fourteenth Amendment, has limited Congress's ability to enforce federal anti-discrimination laws against the states, particularly those laws that protect non-suspect classes.

IV. STATE IMMUNITY AND LEGISLATION PROTECTING NON-SUSPECT CLASSES

Though it has been more than a century since the Fourteenth Amendment was passed, the scope of its protection is still an issue.[128] Clearly the Amendment, through the Equal Protection Clause, prohibits racial discrimination, but it has also been applied more generally to prohibit classifications that burden other identifiable minorities.[129] However, by limiting the scope of congressional legislation under the Fourteenth Amendment to that which addresses judicially recognized violations of constitutional rights, the *Flores* decision

---

121 *See Flores*, 521 U.S. at 519-20.

122 *Id.* at 536.

123 *Id.* at 520.

124 *Id.*

125 *Id.* at 533-34.

126 *Id.* at 519.

127 *Id.* at 520.

128 GUNTHER & SULLIVAN, *supra* note 2, at 628.

129 *See id.*

could dramatically restrict Congress's power to abrogate state immunity in legislation that protects some of these minority groups.[130] When interpreting the scope of the Equal Protection Clause, the Supreme Court has afforded great protection to minority groups such as racial minorities, labeled "suspect classes,"[131] so such groups should be largely unaffected by *Flores*.[132] However, the Court has afforded less protection to other minority groups labeled "non-suspect classes,"[133] such as people who are elderly or disabled, and, as a result, legislation protecting such groups could be at risk.[134] As discussed in the following section, recent Supreme Court cases have confirmed this prediction.

A. *Age:* Kimel v. Florida Board of Regents

Kimel v. Florida Board of Regents[135] involved a challenge to Congress's abrogation of state immunity in the Age Discrimination in Employment Act (ADEA), legislation prohibiting discrimination on the basis of age, a non-suspect classification.[136] In determining whether Congress had properly abrogated state immunity in the ADEA, the Supreme Court initially found that Congress had, in fact, clearly expressed its intention to do so.[137] Once this prong of the test was addressed, the Court then applied the two-part *Flores* test for determining whether the ADEA was appropriate legislation under the Fourteenth Amendment.[138] First, the Court identified the scope of judicially recognized constitutional protection afforded to older persons.[139] It concluded that because

---

130 *See* Rachel Toker, *Tying the Hands of Congress:* City of Boerne v. Flores, *117 S. Ct. 2157 (1997)*, 33 HARV. C.R.-C.L. L. REV. 273, 312 (1998).

131 "Suspect classification" refers to a classification based on a trait that itself seems to contravene established constitutional principles so that any purposeful use of the classification may be deemed suspect. Examples include race, sex, and national origin. BLACK'S LAW DICTIONARY 1460 (7th ed. 1999). When a statute classifies people based on a trait such as race, the classification is said to be "suspect" and must survive "strict scrutiny," meaning that the use of the classification must serve a "compelling" interest. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

132 *See* Toker, *supra* note 130, at 306.

133 As the term implies, "non-suspect classification" refers to a classification that is not suspect, meaning that members of the class have not historically endured unequal treatment. Examples include age and disability. *See Cleburne,* 473 U.S. at 441. A statute that classifies people based on non-suspect traits must survive only a "rational basis" test, meaning that the classification must be rationally related to a legitimate interest. *See id.* at 441-42.

134 *See* Toker, *supra* note 130, at 306.

135 528 U.S. 62 (2000).

136 *Id.* at 66, 83.

137 *Id.* at 73-74.

138 *See id.* at 80-91.

139 *Id.* at 83.

age is traditionally a non-suspect classification, states can discriminate on the basis of age as long as any age-based classification is rationally related to a legitimate state interest.[140]

Once the Court determined the scope of constitutional protection, it then concluded that the ADEA's restrictions on the use of age classifications went well beyond that scope.[141] However, because Congress can prohibit conduct that is constitutional as long as its purpose in doing so is to remedy or prevent unconstitutional conduct, the Court examined the legislative history of the ADEA to determine whether Congress was in fact addressing unconstitutional conduct.[142] The Court found that Congress had "virtually no reason to believe that state . . . governments were unconstitutionally discriminating against their employees on the basis of age."[143] Therefore, because Congress had not identified an existing pattern of unconstitutional discrimination by the states, the Court held that the ADEA could not be considered remedial or preventative.[144] Thus, the ADEA failed the first part of the *Flores* test.

Applying the second part of the *Flores* test for appropriate legislation, the Court next considered whether the scope of the ADEA was congruent and proportional to the constitutional violation being addressed.[145] Because the Act required states to refrain from even rationally considering age in employment decisions and practices, the Court determined that the ADEA was incongruent and out of proportion with the protections afforded to older persons by the Equal Protection Clause.[146] Thus, the ADEA also failed the second part of the *Flores* test, and therefore, the Court held that Congress had improperly abrogated state immunity.[147]

The *Kimel* decision was the first Supreme Court decision to hold that Congress exceeded its authority to enact anti-discrimination legislation protecting a non-suspect class under Section 5.[148] As such, *Kimel* provides some guidance for assessing whether other anti-discrimination legislation protecting non-suspect classes is appropriate legislation under Section 5. However, because the *Kimel* Court did not discuss how Congress could overcome the problems that led the Court to its decision, *Kimel* provides insufficient information to fully

---

140 *Id.*

141 *Id.* at 86. For example, the ADEA prohibits state employers from relying on age as a proxy for other characteristics, but the Constitution does not prohibit such conduct. *Id.* at 88.

142 *Id.* at 88-89.

143 *Id.* at 91.

144 *Id.* at 89-91.

145 *See id.* at 86.

146 *Id.*

147 *Id.* at 91.

148 *See* Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 657 (2000).

determine whether other anti-discrimination legislation will survive similar challenges.[149]

B. *Disability:* Board of Trustees v. Garrett

In *Board of Trustees v. Garrett*,[150] the Supreme Court again considered a challenge to anti-discrimination legislation protecting a non-suspect class, this time people with disabilities.[151] In February of 2001, consistent with its recent trend of expanding state immunity, the Supreme Court held that Congress had again exceeded its enforcement power under Section 5 of the Fourteenth Amendment and, consequently, had improperly abrogated state immunity under the Americans with Disabilities Act of 1990 (ADA).[152] The Court found that, like the ADEA in *Kimel*, the ADA failed both parts of the *Flores* test.[153]

First, the *Garrett* Court identified the scope of judicially recognized constitutional protection afforded to people with disabilities.[154] Relying on a prior Equal Protection case involving people with mental retardation,[155] the Court affirmed that, as with age, disability classifications are non-suspect.[156] Accordingly, states can discriminate on the basis of disability as long as any disability-based classification is rationally related to a legitimate state interest.[157] Thus, for example, states "are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational."[158] Further, even if states make disability-based distinctions because of stereotypes and fears about people with disabilities, such distinctions may still pass the rationality test as long as they "rationally further [ ] the purpose identified by the State."[159]

---

[149] *See* Post & Siegel, *supra* note 88, at 457-58 (2000) (discussing that the Court did not explain the distinction between remedial and substantive legislation nor did it specify how much congruence and proportionality is constitutionally necessary).

[150] 121 S. Ct. 955 (2001) (5-4 decision).

[151] *Id.* at 960, 963. The same division of justices seen in other recent Supreme Court decisions comprised the *Garrett* majority and dissent: Chief Justice Rehnquist, Justices Scalia, Thomas, O'Connor, and Kennedy made up the majority and Justices Breyer, Stevens, Souter, and Ginsburg comprised the dissent. *Id.* at 959.

[152] *Id.* at 967-68.

[153] *Id.* at 966-68.

[154] *Id.* at 963. The question of whether Congress clearly expressed its intent to abrogate state immunity in the ADA was not at issue in *Garrett*. *Id.* at 962.

[155] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

[156] *Garrett*, 121 S. Ct. at 963.

[157] *Id.* at 964.

[158] *Id.*

[159] *Id.* (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976) (per curiam)).

After identifying the scope of judicially recognized constitutional protection afforded to people with disabilities, the Court decided whether the ADA was remedial or preventative legislation.[160] To make this determination, the Court examined whether the ADA's legislative findings sufficiently identified a pattern or history of unconstitutional discrimination by the states against people with disabilities.[161] Although arguably the legislative findings were more extensive for the ADA than for the ADEA at issue in *Kimel*,[162] the Court found that Congress failed to "identify a pattern of irrational state discrimination in employment against the disabled" before passing the ADA.[163] Therefore, the Court determined that the ADA was not a remedial or preventative response to judicially recognized unconstitutional discrimination, and thus failed the first part of the *Flores* test.[164]

Applying the second part of the *Flores* test, the Court next examined whether the ADA was congruent and proportional to the constitutional protections afforded to people with disabilities.[165] The Court concluded that the ADA's requirements far exceeded what is constitutionally required.[166] For example, the Court stated that although it would be rational and, therefore, constitutional, for a state employer to conserve scarce financial resources by hiring employees who can use existing facilities, the ADA nonetheless requires employers to make existing facilities accessible to individuals with disabilities.[167] In addition, the Court found that the ADA's prohibition on the use of employment selection methods that tend to screen out people with disabilities was too broad because it did not consider whether such methods were rational.[168] As a result, the Court determined that the ADA failed the second part of the *Flores* test.[169] Because the ADA failed both parts of the *Flores* test, the Court held that

---

160 *See id.*

161 *Id.* at 964-65.

162 *See id.* at 969 (Breyer, J., dissenting). The *Garrett* dissent argued that Congress compiled a "vast legislative record documenting 'massive, society-wide discrimination' against persons with disabilities." *Id.* (citations omitted). The *Garrett* majority found this evidence to be merely "unexamined, anecdotal accounts" of discrimination by state officials, and therefore insufficient evidence of unconstitutional discrimination. *Id.* at 966.

163 *Id.* at 965. The Court's holding was limited to Title I of the ADA, which deals with employment discrimination, as applied to the states because that was the only issue before the Court. The Court did not decide whether Title II of the ADA, which deals with programs and activities conducted by states, is likewise unconstitutional. *Id.* at 960 n.1.

164 *Id.* at 965-66.

165 *Id.* at 966.

166 *Id.* at 967.

167 *Id.* at 966-67.

168 *Id.* at 967.

169 *Id.* at 966.

it was not appropriate legislation under the Fourteenth Amendment and, accordingly, Congress had improperly abrogated state immunity under the ADA.[170]

In contrast to the *Garrett* majority, Justice Breyer, writing for the dissent, argued that the ADA passed both parts of the *Flores* test.[171] First, although he agreed with the Court that people with disabilities are only entitled to protection from irrational discrimination, Justice Breyer's definition of irrational was broader than the Court's definition.[172] Breyer argued that discrimination that is based on a desire to harm a politically unpopular group or that is based on outmoded stereotypes and fears about people with disabilities is *per se* irrational behavior and, therefore, prohibited by the Fourteenth Amendment.[173] Applying this broader definition of irrational discrimination, Justice Breyer concluded that Congress had found ample evidence of a pattern of unconstitutional discrimination by the states against people with disabilities.[174] Therefore, he determined that the ADA was, in fact, remedial, and met the first part of the *Flores* test.[175]

Second, Justice Breyer found the ADA to be a congruent and proportional response to irrational discrimination.[176] Although Breyer acknowledged that the ADA's requirements went beyond prohibiting irrational discrimination, he again applied his broader definition of irrational discrimination to find that the ADA nonetheless was a reasonable response to the discrimination being addressed.[177] Thus, Justice Breyer concluded that the ADA was appropriate legislation under the Fourteenth Amendment and was a proper exercise of Congress's power to abrogate state immunity.[178]

Finally, Justice Breyer admonished the Court for "improperly invad[ing] a power that the Constitution assigns to Congress" by placing heavy evidentiary demands on Congress, failing to defer to Congress's findings, and failing to distinguish between judicial and legislative powers.[179] Breyer concluded that the Court's application of the *Flores* test essentially "saps [Section] 5 of independent force."[180]

---

170 *Id.* at 967-68.

171 *See id.* at 969 (Breyer, J., dissenting).

172 *See id.* at 969, 971.

173 *See id.* at 971. The majority, on the other hand, felt that such discriminatory behavior was rational so long as it furthered a legitimate state interest. *Id.* at 964.

174 *See id.* at 972.

175 *See id.*

176 *See id.* at 974.

177 *See id.*

178 *See id.* at 976.

179 *Id.* at 975-76.

180 *Id.* at 976.

C. *What's Left for Non-Suspect Classes?*

If, as Justice Breyer pointed out in his *Garrett* dissent, the Court's current test for appropriate legislation under the Fourteenth Amendment renders Section 5 "insignificant,"[181] what options do members of non-suspect classes have when their rights are violated by state employers? Without the power to enforce federal laws in federal court, non-suspect classes are left with few options when states violate their civil rights.[182] Generally, individuals will still be able to file complaints with federal enforcement agencies, seek injunctive relief for ongoing violations, or perhaps seek relief in state court.[183] However, none of these options fully replace the opportunity to seek damages in federal court.[184] First, because federal enforcement agencies have streamlined their investigations of discrimination cases to reduce backlog and provide relief to an overworked system, many complaints filed with those agencies will not be fully investigated.[185] Second, although injunctive relief may stop ongoing discrimination, it does nothing to remedy the damage done by prior discrimination.[186] And finally, individuals attempting to enforce their rights in state court may be limited to enforcing state anti-discrimination laws because state immunity from suit under federal law extends to suits in a state's own courts.[187]

V. CAN CONGRESS ABROGATE STATE IMMUNITY IN LEGISLATION PROTECTING NON-SUSPECT CLASSES?

With the current strict requirements for appropriate legislation under the Fourteenth Amendment, it is unlikely that Congress will be able to abrogate state immunity in legislation that protects non-suspect classes. First, the scope of such legislation is limited to the Supreme Court's recognition of Fourteenth Amendment protections and, according to the Court, non-suspect classes are only protected against "irrational" discrimination.[188] Because the Court has narrowly defined what constitutes irrational discrimination, non-suspect classes are afforded very little protection.[189] Further, in applying the first part of the *Flores* test, the Supreme Court holds Congress to "a strict, judicially created eviden-

---

181 *Id.*

182 *See* Note, *supra* note 40, at 1760-61.

183 *Garrett*, 121 S. Ct. at 968 n.9.

184 *See* Note, *supra* note 40, at 1760-61.

185 *See* Leonard, *supra* note 106, at 665.

186 *See* Note, *supra* note 40, at 1761.

187 *See* Alden v. Maine, 527 U.S. 706, 754 (1999).

188 *Garrett*, 121 S. Ct. at 963-64.

189 *See id.*

tiary standard" to justify Fourteenth Amendment legislation, requiring detailed findings of unconstitutional discrimination.[190]

As part of this evidentiary standard, the Court decided to use a rational basis test when reviewing congressional evidence of discrimination against non-suspect classes.[191] Originally, the rational basis test was developed as a judicial restraint to be used when the courts are reviewing a constitutional challenge to state legislation that burdens a non-suspect minority group.[192] When reviewing state legislation, a court looks at whether a state was rationally pursuing a legitimate purpose when it passed the legislation at issue.[193] If so, the legislation survives the constitutional challenge.[194] In contrast, in the context of state immunity the Court applies the rational basis test to any legislative findings conducted prior to enactment of legislation protecting non-suspect classes to determine whether Congress found any evidence of irrational conduct by the states.[195] If Congress failed to find a history or pattern of irrational conduct by the states, then the federal legislation at issue is not proper remedial or preventative legislation under the Fourteenth Amendment and, therefore, cannot overcome the first hurdle of the *Flores* test.[196]

Even if Congress can overcome this first hurdle, it must still overcome the second hurdle of the *Flores* test: the legislation at issue must have a "congruence and proportionality" to the injury being prevented.[197] Thus, the sweep of legislation that protects non-suspect classes is limited to remedying or preventing only "irrational" discrimination.[198] As a practical matter, considering the Court's broadly defined scope of rational behavior, this limitation leaves Congress little reason to apply anti-discrimination legislation to the states. For example, according to the *Garrett* Court, it is rational for state employers to "conserve scarce financial resources by hiring employees who are able to use existing facilities."[199] If existing state facilities are not accessible to people with dis-

---

190 *Id.* at 972 (Breyer, J., dissenting). In the past, the Court placed the burden of proving unconstitutionality on the party challenging a statute, not on the legislature that passed it. The presumption was in favor of upholding the constitutionality of legislation, absent a contrary showing by the party opposing it. Imposing a burden on Congress to prove the constitutionality of its legislation is contrary to past practice. *See id.*

191 *See id.* at 963-64.

192 *See* GUNTHER & SULLIVAN, *supra* note 2, at 635.

193 *See id.* at 636.

194 *See id.*

195 *See Garrett*, 121 S. Ct. at 963-64.

196 *See id.*

197 *Id.* at 966.

198 *See id.* at 966-67.

199 *Id.*

abilities, Congress cannot require, pursuant to the Fourteenth Amendment, that states modify such facilities so people with disabilities can work.[200] Therefore, the intent of laws like the ADA, to increase opportunities for people with disabilities, will not be fulfilled when the employer in question is a state employer. Hence, absent voluntary compliance by the states, such laws are virtually useless in preventing state discrimination against non-suspect classes.

Because the Court has made the test for appropriate legislation under the Fourteenth Amendment so stringent, Congress may have to resort to enticing the states to consent to suit in federal court to make federal legislation protecting non-suspect classes enforceable.[201] Congress can entice states to consent to suit through its spending power by conditioning receipt of federal funding upon such consent.[202] However, the Supreme Court has held that such power is not unlimited and is subject to several restrictions.[203] To properly obtain state consent to suit, Congress's exercise of its spending power must be for the general welfare, the conditions on spending must be clear and unambiguous, and the conditions must be reasonably related to the purpose of the expenditure.[204] As a result, consent to suit as a condition on receipt of federal funds, although possible, is limited.

VI. CONCLUSION

Balancing states' rights with individual federal rights was an issue even before the U.S. Constitution was adopted. Over the ensuing years, the Supreme Court has struggled to strike the proper balance, alternating between expanding and contracting state immunity from suit in federal court. Currently the Court is in an era of expansion, consistently ruling in favor of states' rights over enforcement of individual rights. By expanding state immunity and narrowing established routes around state immunity, the Court has made it virtually impossible for Congress to abrogate state immunity in legislation that protects the rights of non-suspect classes. Existing anti-discrimination laws are being challenged and one-by-one being declared unconstitutional as applied to the states. However, if history is any indication, we will probably see a reversal of this

---

200 *See id.*

201 *See* David A. Savage, *The Next Federalism Frontier*, A.B.A. J., Apr. 2001, at 30.

202 South Dakota v. Dole, 483 U.S. 203, 206 (1987). In fact, Congress has already conditioned receipt of federal funds on states' waiver of immunity in suits alleging violation of several federal anti-discrimination laws. *See* 42 U.S.C. § 2000(d)(7) (1994). The Supreme Court recently declined to review an Eighth Circuit decision holding that Congress validly conditioned receipt of federal funds on states' waiver of immunity in suits alleging disability discrimination under the Rehabilitation Act. *See* Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000), *cert. denied*, Ark. Dep't of Educ. v. Jim C., 121 S. Ct. 2591 (2001).

203 *Dole*, 483 U.S. at 207.

204 *Id.*

trend in the future. As Alexander Hamilton said, "Tis time only that can mature and perfect so compound a system."[205] Perhaps in time, we will strike the proper balance between states' rights and enforcement of individual rights.

Linda Carter Batiste

[205] THE FEDERALIST No. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed., 1961).